

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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THE ESTATE OF JILL ANN ESCHE, *et al.*,

Plaintiffs,

v.

RENOWN REGIONAL MEDICAL
CENTER, *et al.*,

Defendants.

Case No. 3:21-cv-00520-MMD-CLB

ORDER

I. SUMMARY

After the death of Jill Ann Esche, Plaintiffs The Estate of Jill Ann Esche, Sierra Jill Wofford by and through her guardian ad litem Wayne Wofford, and Cameron Scott Esche sued Defendants Renown Regional Medical Center, Marta J. Bunuel-Jordana, M.D., Caroline Vasendin, M.D., Johanna Gruen, PhD., Earle Oki, M.D., Maegen Smith, RN, and Caitlin E. Herschel, RN, alleging civil rights violations and negligence claims. (ECF No. 6 (“Complaint”).) Before the Court is Defendant Earle Oki’s motion to dismiss (ECF No. 18) all of Plaintiff’s claims against him.¹ As further explained below, because Plaintiffs fail to sufficiently allege that Oki is a state actor, the Court finds that Plaintiffs fail to state a claim against Oki. The Court will therefore grant the motion but will grant Plaintiffs leave to amend their claims.

II. BACKGROUND

The Court adapts the following allegations from the Complaint. Plaintiffs allege that, beginning in late October 2020, Defendants sought and obtained court orders from the Washoe County Second Judicial District Court to involuntarily commit Jill Esche, then approximately 31 weeks pregnant, for over a month until almost immediately after she

¹Plaintiffs responded (ECF No. 27), and Defendants replied (ECF No. 29).

1 gave birth to her child Sierra Wofford by Caesarean section surgery on November 20,
2 2020. (ECF No. 6 at 5-7.) Plaintiffs further allege that Defendants forcibly administered
3 medication and repeatedly reported to the state court that Esche was “not medically
4 cleared” to participate in hearings related to her involuntary hold. (*Id.* at 6-7.) Plaintiffs
5 also allege that Defendants discharged Esche from the hospital on November 22, 2020,
6 and several hours later, Esche was found deceased. (*Id.* at 8-9.)

7 As pertinent to the motion, Plaintiffs allege, specifically as to Oki, that: (1) Oki is “a
8 licensed physician in the State of Nevada [and] resident of Washoe County”; (2) Oki is an
9 “apparent or ostensible agent[]” of Renown “acting within the course and scope of [his]
10 employment”; (3) Oki evaluated Esche upon her arrival to Renown on October 20, 2020;
11 (4) Smith and Herschel, following Oki’s orders, discontinued Esche’s “PICC line” before
12 her discharge on November 22, 2020; (5) Oki, as Esche’s “treating medical physician,”
13 “recommended continued inpatient treatment and observation” after Esche delivered her
14 baby via Caesarean section surgery on November 20, 2020; and (6) Smith and Herschel,
15 upon Oki’s orders, discharged Esche from Renown’s care “against medical advice.” (*Id.*
16 at 3-5, 8, 13-14.)

17 Plaintiffs further allege that “Renown and the individual defendants acted under
18 color of state law by so closely collaborating with state actors in the detention, evaluation,
19 treatment, and failure to make Jill available for Court evaluation as to make their actions
20 indistinguishable from the State’s, and by serving the public functions of confining
21 involuntarily committed individuals and providing them mental health evaluation and
22 treatment services.” (*Id.* at 10, 12-13.)

23 Plaintiffs have asserted five causes of action against Defendants: (1) 42 U.S.C. §
24 1983 (“Section 1983”) – Fourth Amendment; (2) Section 1983 – Fourteenth Amendment;
25 (3) Section 1983 – Failure to Train/Supervise; (4) Wrongful Death/Medical Negligence;
26 and (5) General Negligence. (*Id.* at 10-16.) Oki now moves to dismiss all claims asserted
27 against him under Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiffs fail to
28 allege sufficient facts to state a claim for relief against him under Section 1983 or state

1 law. (ECF No. 18 at 1.) Plaintiffs oppose Oki's motion to dismiss and argue that they have
2 pleaded facially plausible claims. (ECF No. 27.)

3 **III. LEGAL STANDARD**

4 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
5 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide
6 "a short and plain statement of the claim showing that the pleader is entitled to relief."
7 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal
8 quotations and citation omitted). While Rule Eight does not require detailed factual
9 allegations, it demands more than "labels and conclusions" or a "formulaic recitation of
10 the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
11 *Twombly*, 550 U.S. at 555) (internal quotations omitted). "Factual allegations must be
12 enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.
13 Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to
14 "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting
15 *Twombly*, 550 U.S. at 570).

16 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
17 apply when considering motions to dismiss. *See id.* at 678-79. First, a district court must
18 accept as true all well-pleaded factual allegations in the complaint; however, legal
19 conclusions are not entitled to the assumption of truth. *See id.* at 678. Mere recitals of the
20 elements of a cause of action, supported only by conclusory statements, do not suffice.
21 *See id.* Second, a district court must consider whether the factual allegations in the
22 complaint allege a plausible claim for relief. *See id.* at 679. A claim is facially plausible
23 when the plaintiff's complaint alleges facts that allow a court to draw a reasonable
24 inference that the defendant is liable for the alleged misconduct. *See id.* at 678. Where
25 the complaint does not permit the Court to infer more than the mere possibility of
26 misconduct, the complaint has "alleged—but it has not show[n]—that the pleader is
27 entitled to relief." *Id.* at 679 (alteration in original) (internal quotation marks and citation
28 omitted). That is insufficient. When the claims in a complaint have not crossed the line

1 from conceivable to plausible, the complaint must be dismissed. See *Twombly*, 550 U.S.
2 at 570.

3 **IV. DISCUSSION**

4 Oki seeks dismissal of all claims asserted against him. (ECF No. 18 at 1.) Plaintiffs
5 concede that only the first two causes of action, Section 1983 claims based on violations
6 of the Fourth Amendment and Fourteenth Amendment, respectively, are brought against
7 Oki.² (ECF No. 27 at 2.) The Court thus addresses Oki's motion as to only the two
8 challenged Section 1983 claims. The Court then addresses whether it will grant Plaintiff
9 leave to amend the claims that the Court agrees with Defendants should be dismissed.

10 **A. Section 1983 Claims – State Action**

11 As a threshold matter, Oki correctly notes that Plaintiffs' opposition raises new
12 allegations and cites to records, specifically Defendants' initial disclosures, not included
13 with the Complaint. (ECF No. 29 at 2-5.) The Court agrees with Oki that it is improper for
14 the Court to consider new assertions and such evidence at the motion to dismiss stage.
15 See *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) ("In determining the
16 propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a
17 plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion
18 to dismiss.") (internal quotations, emphasis, and citation omitted). The Court will therefore
19 not consider Plaintiffs' new allegations or citations to initial disclosures in deciding this
20 motion.³

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24 ²Because Plaintiffs concede that they do not assert their fourth and fifth causes of
25 action against Oki, the Court need not—and does not—address Oki's arguments and
26 Plaintiffs' counterarguments about whether Plaintiffs were required to comply with and
have indeed complied with NRS § 41A.071, which appear to be directed at the fourth and
fifth claims. (ECF No. 27 at 2; ECF No. 18 at 11-14.)

27 ³But to be clear, the Court may—and will—consider allegations raised for the first
28 time in Plaintiffs' opposition papers in determining whether to grant leave to amend or to
dismiss the complaint with or without prejudice. See *Orion Tire Corp. v. Goodyear Tire &
Rubber Co.*, 268 F.3d 1133, 1137-38 (9th Cir. 2001).

Oki argues that Plaintiffs fail to state a claim against him under Section 1983 because Plaintiffs do not sufficiently plead that he is a state actor.⁴ (ECF No. 18 at 6-9.) Plaintiffs respond that Oki's actions are "inextricably intertwined with the state's process to involuntarily restrict" Esche's freedom. (ECF No. 27 at 1.) As explained below, the Court agrees with Oki.

To state a claim under Section 1983, a plaintiff "must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of law." *West v. Atkins*, 487 U.S. 42, 48-49 (1988) (citations omitted). A private entity may be subject to liability under Section 1983 in certain situations. See *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 954 (9th Cir. 2008). But the Court must begin its analysis with the presumption that private conduct does not constitute governmental action. See *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). "State action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Villegas*, 541 F.3d at 955 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)) (internal quotations and brackets omitted).

Plaintiffs' allegations do not establish that Oki is a state actor. As to Plaintiffs' first and second causes of action, the Complaint contains no specific allegations against Oki, much less any specific allegations that Oki is a state actor. (ECF No. 6 at 10-13.) In fact, Oki is only mentioned by name six times throughout the entire 18-page Complaint, as detailed above. (*Id.* at 3-5, 8, 13-14.) Taken as true, none of those specific allegations, which merely identify Oki as Esche's physician at Renown and a few of his orders and recommendations regarding Esche's obstetrics treatment and discharge, suggest a "close nexus" between the government and Oki's actions while employed at a private

⁴Oki also argues that Plaintiffs fail to allege sufficient facts that Oki violated Esche's Fourth and Fourteenth Amendment rights. (ECF No. 18 at 9-11.) It appears that Oki is likely correct because, as discussed further below, specific allegations against Oki in the Complaint are sparse and not directly connected to the alleged violations. (ECF No. 6.) But the Court need not—and does not—address those arguments to reach its conclusion.

1 hospital. (See *id.*) See also *Villegas*, 541 F.3d at 955. Moreover, they bear no meaningful
2 connection to the alleged “state action” of Plaintiffs’ first two claims, which appears to be
3 based on Defendants’ continued involuntary commitment of Esche and preventing Esche
4 from participating in hearings regarding her involuntary hold. (ECF No. 6 at 10-13.) The
5 Court therefore finds these specific allegations against Oki do not sufficiently plead state
6 action.

7 As to the first two causes of action, the Complaint contains some allegations that
8 tend to show state action, but those allegations similarly do not establish that Oki is a
9 state actor. First, Plaintiffs broadly allege that “Renown and the individual defendants
10 acted under color of state law by so closely collaborating with state actors . . . as to make
11 their actions indistinguishable from the State’s.” (*Id.* at 10, 12.) Oki argues that Plaintiffs’
12 allegation here is “vague and conclusory” and makes “no connection” between Oki’s
13 actions that can “fairly be attributed to the government.” (ECF No. 18 at 8.) The Court
14 agrees with Oki and finds that Plaintiffs’ broad allegation is a legal conclusion not entitled
15 to the assumption of truth and therefore insufficient to state a plausible claim. See *Iqbal*,
16 566 U.S. 662, 678.

17 Second, the Court also agrees with Oki that to the extent the “state action” is based
18 on allegations of extending the legal hold of Esche, those allegations are not directed at
19 Oki but specifically at Defendants Renown, Vasendin, Gruen, and Bunuel. (ECF No. 6 at
20 11.) And to the extent the “state action” is based on allegations of preventing Esche from
21 exercising her due process rights, those allegations are broadly directed at unspecified
22 Defendants with no factual assertions connecting such allegations to Oki, as the Court
23 found above. (*Id.* at 12-13.)

24 Lastly, the Court finds unpersuasive Plaintiffs’ various arguments in response.
25 While it may be true, as Plaintiffs argue, that “a determination of whether a party is a state
26 actor is an intensive, specific factual analysis,” Plaintiffs still fail to sufficiently allege that
27 Oki is a state actor. (ECF No. 27 at 6.) And Plaintiffs’ reliance on *Rawson v. Recovery*
28 *Innovations, Inc.*, 975 F.3d 742 (9th Cir. 2020), to argue that Oki is a state actor is similarly

1 unpersuasive. (ECF No. 27 at 7-10.) In *Rawson*, the Ninth Circuit, reversing a district
 2 court's grant of summary judgment, held that a private hospital and some of its employees
 3 were acting as state actors when they allegedly wrongfully detained the plaintiff, forcibly
 4 injected him with antipsychotic medications, and misled a court into extending his period
 5 of involuntary commitment. See 975 F.3d at 745. Plaintiffs analogize this case to *Rawson*
 6 using new allegations specifically directed at Oki (e.g., "that Oki himself 'renewed' the
 7 legal hold") and supported by citations to records not included in the Complaint that,
 8 again, the Court cannot consider. (ECF No. 27 at 9-10.) Plaintiffs' *Rawson* arguments are
 9 therefore unpersuasive at this stage.

10 Accordingly, Plaintiffs have not rebutted the presumption that private conduct does
 11 not constitute governmental action and fail to state a claim under Section 1983 against
 12 Oki. See *Sutton*, 192 F.3d at 835. The Court will thus dismiss all claims against Oki.

13 **B. Leave to Amend**

14 Plaintiffs request leave to amend if the Court dismisses any of Plaintiffs' claims
 15 against Oki. (ECF No. 27 at 10.) Oki argues that amendment will not cure Plaintiffs' "fatal
 16 defect" in their Section 1983 claims against him. (ECF No. 29 at 10-11.) As explained
 17 below, the Court disagrees with Oki and grants Plaintiffs leave to amend.

18 The Court has discretion to grant leave to amend and should freely do so "when
 19 justice so requires." Fed. R. Civ. P. 15(a); see also *Allen v. City of Beverly Hills*, 911 F.2d
 20 367, 373 (9th Cir. 1990). Nonetheless, the Court may deny leave to amend if it will cause:
 21 (1) undue delay; (2) undue prejudice to the opposing party; (3) the request is made in bad
 22 faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would
 23 be futile. See *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008).
 24 Facts raised for the first time in a plaintiff's opposition papers should be considered by
 25 the Court in determining whether to grant leave to amend or to dismiss the complaint with
 26 or without prejudice. See *Orion Tire Corp.*, 268 F.3d at 1137-38.

27 As evidenced by Plaintiffs' attempts to assert new allegations against Oki in their
 28 opposition brief, amendment is unlikely to be futile. (ECF No. 27.) Moreover, Plaintiffs

1 have not previously amended their Complaint and therefore have not repeatedly failed to
2 cure deficiencies. The Court thus finds that leave to amend is appropriate with respect to
3 Plaintiffs' claims against Oki. Plaintiffs must file their amended complaint containing
4 amended allegations against Oki within 30 days.


5 **V. CONCLUSION**

6 The Court notes that the parties made several arguments and cited to several
7 cases not discussed above. The Court has reviewed these arguments and cases and
8 determines that they do not warrant discussion as they do not affect the outcome of the
9 motion before the Court.

10 It is therefore ordered that Defendant Earle Oki's motion to dismiss (ECF No. 18)
11 is granted, but the Court grants Plaintiffs leave to amend.

12 It is further ordered that Plaintiffs must file their amended complaint containing
13 amended allegations to cure the deficiencies identified herein against Oki within 30 days.
14 Failure to do so will result in dismissal of the claims against Oki with prejudice.

15 DATED THIS 21st Day of September 2022.

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20 MIRANDA M. DU
21 CHIEF UNITED STATES DISTRICT JUDGE
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